



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

PETITION NO. 3 OF 2019

IN THE MATTER OF ARTICLES 1, 1, 3(1) & 2, 5(3), 28, 41(1), 47(10 & (2) & 48, 50 (1) (2) (a) & (O) & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

RULE 4, 10, 11, 13 & 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY AND PROTECTIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS) (HIGH COURT PRACTICE AND PROCEDURE RULES 2013)

AND

ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1) & 28, 47 (1) & 50 (1) (2) (a) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

NANYUKI EXPRESS CABS SAVINGS AND

CREDIT SOCIETY LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF MARSABIT.....RESPONDENT

RULING

[1] The significant orders sought in the Notice of Motion dated 22nd May 2019 are:-.

(a) Conservatory orders to stay the respondent’s letter dated 17th April 2019 (sic) (and received on 17th May 2019) suspending the petitioner’s operating license in Marsabit County and order the respondent to allow the petitioner’s matatu vans to operate normally without any interference by the respondent or any of its employees, agents and/or servants.

[2] The motion is expressed to be brought pursuant to **Article 22, 23 and 258 of the Constitution of Kenya**. The grounds upon which the application is premised are set out in the application and the supporting affidavit of Henry Mwaniki Gichere, vice chairman of the management committee of the petitioner, sworn on 22nd May 2019. It is contended that the respondent blatantly violated the petitioner’s and its member’s rights under **Article 27, 28 and 50 (2) (a) of the Constitution** by suspending its operating license in Marsabit County without offering it an opportunity to be heard. In addition, the petitioner was never asked to show cause why its’ operating license should not be suspended. Therefore, the Respondent acted contrary to the rules of natural justice, thus, violating the petitioner’s and its members’ right to fair administrative action.

Respondent: Petitioner flouted requirements

[3] The Respondent opposed the application through the replying affidavit of Boru Golicha Gababo, town administrator and acting municipal manager of Marsabit municipality town, sworn on 4th June 2019. He deposed that via a letter dated 16th October 2018 the respondent wrote to all Saccos’ operating *matatu* and bus service business within Marsabit town including the petitioner informing them of the respondent’s plan of the *matatu* stage. The petitioner failed to fulfill the requirements in the letter and provided no explanation.

[4] On 9th May 2019 a joint consultative meeting was called between all the officials of matatu operators and respondent to notify them of the progress made towards streamlining their operations and also handle issues of breach of peace between the petitioner and Meiso Sacco. The petitioner's officials disregarded this and instead arrived at the governor's office with over 20 touts, got into an altercation with the officials of Meiso Sacco which caused a disruption that halted operations at the governor's office. After briefing them of the intended plan and taking their views into consideration a consultative committee of the respondent was constituted that recommended the suspension of operations of the two Saccos for two business days.

[5] According to the deponent, the petitioner was advised to comply with the requirements in the letter dated 16th October 2018 by noon 13th May 2019 and informed of the possible consequence of non-compliance according to the terms on which the permit was issued; apart from obtaining the single business permit the petitioner was operating without being issued with a picking and dropping bay.

[6] He averred further that a follow up meeting was held on 13th May 2019 between the petitioner and consultative committee where the former was found to be in breach of the directive issued on 9th May 2019 regarding letter of 16th October 2018 and it was recommended by the committee that a 30 days suspension of the petitioner's operation pending compliance and resolution of all issues pertaining the petitioner. The petitioner continued operations necessitating its suspension until further notice. The issuing authority under the conditions prescribed on the permit can cancel the permit if any county laws are contravened and implementation by the respondent of these regulations cannot be said to be contravening the petitioner's right.

Submissions by parties

[7] This matter was canvassed by way of oral submissions. Mr. Wahome, counsel for the petitioner insisted that the petitioner was not given any notice or opportunity to be heard. He was categorical that at no point was the petitioner's management invited to any kind of hearing. He emphasized that the license given to the petitioner came with picking and dropping bay. It was his submission that, the county government ought to have complied with the requirements of administrative action. He relied on the case of **Nanyuki Express Cabs Savings and Credit Society Limited v The County Government of Isiolo Petition No. 10 of 2019**.

[8] Mr. Behailu, counsel for the respondent submitted by reiterating what he stated in his affidavit. He added that the petitioner's skipped Marsabit and went to Moyale where they applied for a permit. But when they applied for a permit in Marsabit, they did so without making a request to be provided with a picking and dropping bay. They were asked to provide information on number of vehicles, location of office et cetera to be given a picking and dropping bay but failed to provide the particulars. All Saccos complied apart from the petitioner. It was his argument that the petitioner has come to court with unclean hands as they failed to comply with lawful instructions of which sufficient notice was given to them.

ANALYSIS AND DETERMINATION

[9] The issue of determination is whether to issue the conservatory orders sought?

[10] According to the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others (2014) eKLR**:

'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of irreparable' harm occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

See also the persuasive decision by Onguto J in the case of **Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 others [2015] eKLR** where he stated the following:

"For the grant of conservatory orders under Article 23(3) of the Constitution as read together with Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 the court ought to consider certain pertinent factors. A series of cases may be stated to have laid down the proper guidelines applicable. I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:

- ***The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others -v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi -v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015. and also Muslims for Human Rights and Others -v- Attorney General & Others HCCP No. 7 of 2011.***

- ***The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others -v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba -v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.***

- ***If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora -v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.***

· **The Public interest should favour a grant of the conservatory order:** see the Supreme Court of Kenya’s decision in *Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.*

· **The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters:** see *Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012* as well as *Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.*”

[11] Does the petitioner satisfy the legal test above stated? Upon careful examination of the material before the court, I take the following view of the matter.

[12] **Article 47 of the Constitution of Kenya**, is central to these proceedings. The article stipulates as follows: -

“1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

3) ...”

Pursuant to the said **Article**, Parliament enacted the **Fair Administrative Act, 2015 (“the Act”)**. **Section 4(3) of the Act** provides:-

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

a) prior and adequate notice of the nature and reasons for the proposed administrative action;

b) an opportunity to be heard and to make representations in that regard;

c) ...

d) ...

e) notice of the right to legal representation, where applicable;

f) ...

g) information, materials and evidence to be relied upon in making the decision or taking the administrative action”

[13] The petitioner’s case is that it operates a matatu transport business for over 200 vans belonging to its members. The letter dated 17th April 2019 suspended its license without being accorded their right under **Article 47 of the Constitution**.

[14] The respondent was of a different view; that they are entitled to suspend the licence under the regulations following the petitioner’s blatant disobedience of stipulations and requirements contained in the letter dated 16th October 2018. They accused the petitioner of continuing with their operations in spite of a temporary suspension of their operations by the County Government for not having a loading and picking up bay. Further accusations; they stirred up a disruption at the governor’s office halting operations and service delivery.

[15] The respondent has tendered minutes for the meeting held on 9th May 2019 at the Governor’s Boardroom Marsabit. It was called to try and resolve the dispute between the petitioner and Meiso Sacco which had resulted into a disruption of operations at the governor’s office. The conclusion of the said meeting was that the two were to furnish the office of the county secretary with the necessary working documents for a conclusive decision. The next meeting was scheduled for 13th May 2019 where it was concluded that the petitioner’s license be suspended.

[16] From the onset, it seems that meetings were held in May 2019, except however, the suspension letter in controversy had already been written as it is dated 17th April 2019. From the record, the petitioner received the said letter on 17th May 2019. From these facts, it is fair and justifiable to conclude that the respondent had already made its administrative decision to suspend the petitioner’s license even before the said consultative meetings were held.

[17] The respondent has the power and is constitutionally-mandated to manage the affairs of its County. I am also aware that under the regulations the issuing authority may cancel a permit if any county laws or conditions of the permit are contravened. Similarly, due implementation by the respondent of lawful regulations cannot be said to be a contravention of a right. Be that as it may, actions and decisions by the County or its organs must be guided by and be within the prescriptions in the Constitution and the Law. The respondent has been accused of noncompliance with **Article 47 of the Constitution and Section 4 of the Fair Administration Act, 2015** for it failed to give the petitioner an opportunity to be heard before making and implementing a decision to suspend the operations of the petitioner. Such decision was an administrative action which affected the rights of the petitioner and its members. It ought therefore to have been preceded by notice as well as due opportunity to be heard. Accordingly, the petitioner has demonstrated on a *prima facie* basis that their rights have been infringed.

[18] From the foregoing, it is clear the direction the facts of this case are steering the court: the application is meritorious and I issue the following orders:

- a) **THAT pending hearing and determination of this petition I issue a conservatory orders and hereby stay the respondent's letter dated 17th April 2019 suspending the petitioner's operating license in Marsabit County. The petitioner's matatu vans to operate normally without any interference by the respondent, its employees, agents and/or servants**
- b) **The costs of the application shall abide the petition.**

Dated at Nairobi this 19th day of September, 2019

F. GIKONYO

JUDGE

Dated and delivered in open court at Meru this 25th day of September, 2019

A. MABEYA

JUDGE

In presence of

Mwilaria holding brief for Wahome for petitioner

Mr. Gitonga holding brief for Muriuki for respondent.